MYRTLE JAYCOX, SERAFINA ANELON
HILMA C. EAKON (ON RECONSIDERATION)

IBLA 75-473, 75-550,
75-607 Decided May 17, 1982

Appeals from decisions of Fairbanks District Office and Alaska State Office, Bureau of Land Management, rejecting Native allotment applications. F-18855, AA-6153, F-18746.

Petitions for reconsideration granted; prior Board decisions in Myrtle Jaycox, 22 IBLA 324 (1975), Serafina Anelon, 22 IBLA 104 (1975), and Hilma Eakon, 22 IBLA 41 (1975), and decisions appealed from, vacated; cases remanded.

1. Alaska: Native Allotments

> Where a Native allotment application has been rejected for failure to provide adequate evidence of use and occupancy, the case will be remanded to BLM to be held for approval pursuant to sec. 905(a) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2435 (1980), subject to the restrictions of sec. 905(d) on allotments of land withdrawn or classified for powersite purposes, in the absence of the filing of a protest prior to the 180th day following the effective date of the Act.

APPEARANCES: James Grandjean, Esq., and Donald E. Clocksin, Esq., Anchorage, Alaska, for appellant Myrtle Jaycox; Henry W. Cavallera, Esq., and James Holloway, Esq., Dillingham, Alaska, for appellant Serafina Anelon; John Scott Evans, Esq., Nome, Alaska, for appellant Hilma C. Eakon.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Myrtle Jaycox, Serafina Anelon, and Hilma C. Eakon have petitioned the Board for reconsideration of various decisions in which we affirmed decisions of the Fairbanks District Office and the Alaska State Office, Bureau of Land Management (BLM), rejecting appellants' Native allotment applications because they had not presented adequate evidence of substantially continuous use and occupancy of the land for a period of 5 years, as required by the Act of

May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed, 43 U.S.C. § 1617 (1976), subject to applications pending on December 18, 1971), and its implementing regulations, 43 CFR Subpart 2561. 1/

[1] On December 2, 1980, subsequent to the submission of appellants' petitions for reconsideration, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371 (1980), which governs the resolution of these matters. Section 905(a)(1) of ANILCA, 94 Stat. 2435 (1980), provides that "[s]ubject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended), which were pending before the Department of the Interior on or before December 18, 1971 * * * are hereby approved on the one hundred and eightieth day following the effective date of this Act." Section 905(a)(1), however, does not apply unless the land was either "unreserved on December 13, 1968, or * * * within the National Petroleum Reserve -- Alaska." Moreover, section 905(a)(1) does not apply and Native allotment applications will remain subject to adjudication under the Act of May 17, 1906, as amended, in certain enumerated circumstances including those where a protest is filed within 180 days following enactment of ANILCA. Section 905(a)(5), 94 Stat. 2435.

Where the land described in an application is embraced in a powersite withdrawal, reservation, or classification, such land may be regarded as vacant, unappropriated, and unreserved within the meaning of the Act of May 17, 1906, as amended, and the Native allotment application is subject to approval pursuant to section 905(a)(1), provided the land is not included as part of a project licensed under part I of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. §§ 791a to 823 (1976). ANILCA, P.L. 96-487, section 905(d), 94 Stat. 2437 (1980); Wayne C. Williams (On Reconsideration), 61 IBLA 181 (1982). Such an allotment shall be subject

1/ Myrtle Jaycox has petitioned for reconsideration of the Board's decision in Myrtle Jaycox, 22 IBLA 324 (1975). The case involves 80 acres of land, parcel "B," situated in sec. 8, T. 18 N., R. 8 W., Kateel River meridian, Alaska. Serafina Anelon has petitioned for reconsideration of the decision in Serafina Anelon, 22 IBLA 104 (1975). The case involves 120 acres of unsurveyed land in parcel "B," situated in protracted sec. 28, T. 5 S., R. 33 W., Seward meridian, Alaska. Appellant's application as to parcel "B" was originally rejected by BLM because part of the land had been withdrawn by Powersite Reserve 485 on Apr. 1, 1915, prior to applicant's alleged use and occupancy, and because of lack of evidence of applicant's use and occupancy of the remainder of parcel "B." The Board affirmed. Hilma C. Eakon has petitioned for reconsideration of the decision in Hilma Eakon, 22 IBLA 41 (1975). The case involves 120 acres of land, situated in secs. 8 and 17, T. 22 S., R. 12 W., Kateel River meridian, Alaska. Appellant's application as to an additional 40 acres of land was originally approved by BLM. Because these cases involve similar legal issues, we have chosen to consolidate them for decision.

to the right of reentry provided the United States by section 24 of the Federal Power Act, 16 U.S.C. § 818 (1976), where applicant's use and occupancy commenced after withdrawal or classification of the land for powersite purposes. Section 905(d).

There appear to be no valid existing rights in conflict with the applications except for a patent of a portion of the land embraced in parcel "B" of the Myrtle Jaycox application which preceded the filing of her application with BLM. The balance of the land in the applications was not reserved on December 13, 1968, with the exception of that part of parcel "B" in Serafina Anelon's application which was withdrawn for powersite purposes on April 1, 1915. We have no basis for concluding that appellants' applications were not pending before the Department on December 18, 1971. 2/ Accordingly, subject to the exception of the patented land and subject to the limitations of section 905(d) on allotments of lands within powersite withdrawals, it appears the applications may be granted subject to resolution of any protest filed under section 905(a)(5) of ANILCA, 94 Stat. 2435 (1980), before the end of the 180-day period. 3/

On remand, therefore, BLM should hold appellants' applications for approval, subject to any action which may have arisen prior to the expiration of the 180-day period prescribed. Bill Nekeferoff, 62 IBLA 170 (1982). Failure to provide adequate evidence of use and occupancy does not bar approval of the allotment applications. Id.

2/ There is some question as to whether the Native allotment applications of appellants Myrtle Jaycox and Hilma C. Eakon were pending before the Department on Dec. 18, 1971. Although appellants' applications were dated, respectively, January 1971 and September 1971, they were not filed with BLM until April and May 1972, when the Bureau of Indian Affairs (BIA) filed them on appellants' behalf. It appears that many Native allotment applicants had filed their applications with BIA prior to Dec. 18, 1971, but that BIA had held them past the time when they were required to be filed with BLM. Such applications are deemed to be pending on Dec. 18, 1971. See, e.g., Julius F. Pleasant, 5 IBLA 171 (1972). On remand, appellants should be required to establish that their applications were filed with BIA prior to Dec. 18, 1971. Evan Chiskok (On Reconsideration), 61 IBLA 1 (1981).

3/ Two other exceptions enumerated in section 905(a) of ANILCA, supra, are not applicable. Section 905(a)(3) involves a determination that the land is "valuable for minerals, excluding oil, gas, or coal." 94 Stat. 2435 (1980). In the cases of Serafina Anelon and Hilma C. Eakon, the land was determined to be valuable for minerals; however, the specific minerals were oil and gas, which are reserved to the United States. 43 U.S.C. §§ 270-11 and 270-12 (1976). Section 905(a)(4) involves the situation where an allotment application describes land "which on or before December 18, 1971, was validly selected by * * * the State of Alaska" and is not within the core township of a Native village. In the case of Serafina Anelon, the land was selected by the State of Alaska; however, the selection was made subsequent to Dec. 18, 1971.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decisions in Myrtle Jaycox, supra, Serafina Anelon, supra, and Hilma Eakon, supra, and the decisions appealed from are vacated, and the cases are remanded to BLM for further action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge